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No. 79-692

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

HENRY SCHWARTZE, et al.,

Petitioners,

v.

EMIL WENZ, et al.,

Respondents.

ON PETITION FOR
A WRIT OF CERTIORARI
TO THE
SUPREME COURT OF MONTANA

RESPONDENTS' BRIEF IN OPPOSITION

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OPINION BELOW

In addition to the opinion of the Montana Supreme Court appended to the Petition which was delivered August 1, 1979, a Petition for Rehearing was denied September 11, 1979; a copy of that order is appended to Respondents' Brief in Opposition. (Res. Brief, A. p. 1)

JURISDICTION

Respondents do not question the jurisdiction as set forth in the Petition.

QUESTION PRESENTED FOR REVIEW

Respondents are astounded by the multiplicity of questions asserted by Petitioner. A cursory analysis of the proffered questions sustains the conclusion that all are either solely questions for state determination or are variations of the one possible federal question which might be presented here for review. That is:

Whether the State of Montana must give full faith and credit to a California custody order under facts, summarized as follows:

> A custody proceeding was brought in Montana by the maternal grandparents and an aunt and uncle on behalf of a minor child physically in Montana, against both natural parents. The natural parents had been previously divorced in California and the initial divorce decree awarded custody to the natural mother.
>
> After commencement of the Montana action, but prior to a trial on the merits in Montana, the father obtained an Order granting him custody pursuant to a stipulation with the mother. The California Order was obtained with full knowledge of the pending Montana proceeding, without any hearing on the merits by the California Court; without notice to the California Court of the pendency of the action in Montana; without notice or opportunity to appear to either the Petitioners in Montana or the Montana Court as required by California statutes;

thereby precluding any inquiry by Montana into the merits in the Montana custody proceeding.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to and, where necessary, in clarification of the matters set forth in the Petition, Respondents submit the following:

(1) The cross-referencing of comparative sections of the Uniform Child Custody Jurisdiction Act in California and Montana by Petitioner at pp. 6-27 of his Petition is in error. Respondents therefore submit the following table:

California Civil Code (12A West's Annotated Cal. Codes (Supp.) pp.135-149)	Montana Code Annotated (9 MCA pp. 31-32, 78-85)	Uniform Child Custody Jurisdiction Act (9 ULA pp. 111-169)
§5150	§40-7-102	§1
§5151	§40-7-103 (modified)	§2
§5152	§40-4-211	§3
§5153	§40-7-105	§4
§5154	§40-7-106	§5
§5155	§40-7-107	§6
§5156	§40-7-108	§7
§5157	§40-7-109	§8
§5158	§40-7-110	§9
§5159	§40-7-111	§10
§5160	§40-7-112	§11
§5161	§40-7-113	§12
§5162	§40-7-114	§13
§5163	§40-7-115	§14
§5164	§40-7-116	§15
§5165	§40-7-117	§16
§5166	§40-7-118	§17
§5167	§40-7-119	§18
§5168	§40-7-120	§19
§5169	§40-7-121	§20
§5170	§40-7-122	§21
§5171	§40-7-123	§22

§5172	§40-7-124	§23
§5173	§40-7-125	§24
§5174	§40-7-101	§26

(2) California Civil Code Section 4600 (12 A Cal. Code Annotated [Supp.] 54:)

"§4600. Custody order; preferences; findings; allegations; exclusion of public.

In any proceeding where there is at issue the custody of a minor child, the court may, during the pendency of the proceeding or at any time thereafter, make such order for the custody of such child during his minority as may seem necessary or proper. If a child is of sufficient age and capacity to reason so as to form an intelligent preference as to custody, the court shall consider and give due weight to his wishes in making an award of custody or modification thereof. Custody should be awarded in the following order of preference:

(a) To either parent according to the best interests of the child * * * .

(b) To the person or persons in whose home the child has been living in a wholesome and stable environment.

(c) To any other person or persons deemed by the court to be suitable and able to provide adequate and proper care and guidance for the child.

Before the court makes any order awarding custody to a person or persons other than a parent, without the consent of the parents, it shall make a finding that an award of custody to a parent would be detrimental to the child and the award to a nonparent is required to serve the best interests of the child. Allegations that parental custody would be detrimental to the child, other than a statement of that ultimate

fact, shall not appear in the pleadings. The court may, in its discretion, exclude the public from the hearing on this issue."

(3) Section 40-6-233 Montana Code Annotated (9 MCA 75):

"40-6-233. Remedy for parental abuse. The abuse of parental authority is the subject of judicial cognizance in a civil action brought by the child or by its relative within the third degree or by the county commissioners of the county where the child resides. When the abuse is established, the child may be freed from the dominion of the parent and the duty of support and education enforced."

(4) Section 45-5-304 Montana Code Annotated (9 MCA 224):

"45-5-304. Custodial interference. (1) A person commits the offense of custodial interference if, knowing that he has no legal right to do so, he takes, entices, or withholds from lawful custody any child, incompetent person, or other person entrusted by authority of law to the custody of another person or institution.

(2) A person convicted of the offense of custodial interference shall be imprisoned in the state prison for any term not to exceed 10 years.

(3) A person who has not left the state does not commit an offense under this section if he voluntarily returns such person to lawful custody prior to arraignment. A person who has left the state does not commit an offense under this section if he voluntarily returns such person to lawful custody prior to arrest."

(5) Rule 4B(2) Montana Rules of Civil Procedure (6 MCA 88):

> "(2) Acquisition of jurisdiction. Jurisdiction may be acquired by our courts over any person through service of process as herein provided; or by the voluntary appearance in an action by any person either personally, or through an attorney, or through any other authorized officer, agent or employee."

STATEMENT OF THE CASE WITH FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTIONS PRESENTED

Respondents are constrained to restate the case for the reason that, where particularly significant, Petitioner's statement (Petition, pp. 28-34) is not supported by the record. Respondent's statement of the case follows:

1. Petitioner, Henry Schwartze, is a resident of California. Respondents, Emil Wenz, Irene Wenz, John Holden and Linda Holden, are residents of Montana.

2. Alexandra Schwartze, the ten-year-old child the subject of this proceeding, is the daughter of Henry Schwartze and Diane Schwartze (Diane Schwartze and her present husband, referred to in the Petition as Bridges, were Defendents below where judgment was entered against them; they have not appeared here).

3. Respondents, Emil Wenz and Irene Wenz, are the maternal grandparents of Alexandra Schwartze and the parents of Diane Schwartze and Respondent Linda Holden.

4. Respondents John Holden and Linda Holden are husband and wife. They have had physical custody and control of Alexandra Schwartze since June 17, 1975. They have four (4) other children, Laura, Jack, David and Janell, ages 15, 13, 11 and 2 respectively.

5. (All persons involved shall be hereinafter referred to by their first name where possible to facilitate the

presentation of the matter to this Court.) Henry and Diane were married June 12, 1966, in Oregon. They moved to California in 1969 where Alexandra was born June 20, 1969. Henry and Diane separated about December, 1970. Diane commenced a dissolution proceeding in California in 1971; a final Decree of dissolution was entered January 13, 1972. Diane was granted the permanent custody of Alexandra. Henry did not contest the award though he knew that Diane was living with Bridges; that they were using drugs, and that Diane appeared to be mentally ill.

6. After dissolution, Henry made no reasonable effort to comply with his nominal obligation to make child support payments for Alexandra required by the Decree of dissolution. He was twice cited in California to show cause why he should not be held in contempt: January, 1973, and February, 1975. The 1973 proceeding resulted in a decreased child support obligation by reason of a stipulation between Henry and Diane; however, he misrepresented his financial condition to the California Court and to Diane by not disclosing that he had just received almost One Hundred Thousand Dollars ($100,000.00) from the sale of real property.

7. From February, 1974, Henry knew that Alexandra, not then five (5) years of age, had reported to his mother, Fannie Boller, that she was being sexually abused by Bridges, with whom Diane was still living. Fannie Boller, a retired nurse married to a retired doctor, had observed signs of abuse on Alexandra's person. Henry was aware of the abhorrent living circumstances of Alexandra. He seldom saw his daughter, claiming at trial that he often did not know where she was; however, his mother Fannie knew where Alexandra was at all times, seeing her at least weekly.

8. On May 12, 1975, Alexandra was thrown out by Diane. That day Diane called Fannie Boller (not Henry) and told her to take the child, stating that Alexandra

could not live with her any more. Diane also then gave Fannie most of Alexandra's clothes and medical records. Thereafter, Alexandra stayed with Fannie Boller. She began traveling with Fannie Boller and her husband, first to Oregon and then to Montana, arriving June 15, 1975, at the ranch of John and Linda Holden.[1/]

9. After discussions on June 16, 1975, with the Holdens, Fannie Boller was told by the Holdens that Henry's fitness to have custody as well as that of Diane was suspect. Henry was similarly advised by telephone.

10. On June 17, 1975, Warren Wenz, a Montana attorney and cousin of Linda and Diane, advised Jerome Kessler, Henry's California attorney, that the Holdens wanted custody of Alexandra. Attorney Kessler advised Attorney Wenz that Henry had never been able to make up his mind whether he wanted custody of Alexandra. The same day Fannie Boller left Alexandra with the Holden family, leaving her clothing, medical records and birth certificate.

11. On June 18, 1975, Attorney Wenz advised Attorney Kessler that the Respondents would commence the Montana action (from which this proceeding has resulted) on June 20, 1975. The two-day delay was necessary due to the distances involved between the location of the Montana District Court, the presiding District Judge, and the Respondents.

12. The Montana action was commenced pursuant to Section 40-6-233 MCA which granted the Montana District Court jurisdiction of Alexandra by reason of her presence in the state at that time. "Residing" as used in the statute means mere presence. On June 19, 1975, the

1/ Henry in his Petition states at paragraph 11 of his Statement of the Case (Petition, p. 30) that Alexandra's travels with Fannie Boller were with Diane's "permission". There was no such grant. Diane never retracted from her action May 12, 1975, when she threw Alexandra out.

then presiding District Judge made an order granting temporary custody to John Holden and Linda Holden. The Complaint in the Montana proceeding was filed June 20, 1975, and the Order granting temporary custody to the Holdens was formally entered and issued by the Clerk of that Court. The Holdens retained custody of Alexandra pursuant to that Order until entry of the Judgment and Order of the Montana District Court dated November 28, 1977, under which Order the Holdens have since retained Alexandra.

13. On June 19, 1975, Henry commenced a proceeding in California requesting modification of custody from Diane to himself. His Petition was based on facts he had known for approximately one and one-half years. Diane stipulated to the modification, and on July 7, 1975, an Order was entered which modified the initial California Decree by granting Henry custody of Alexandra. The Order was entered without notice to the Respondents of the Petition and without granting them the opportunity to appear and contest it. The Order was entered without inquiry by the California Court into the merits of the Petition or notice to it of the Montana proceeding; no testimony was taken, the California Court relying (as stated in the Order) upon declarations made by Henry.

14. At all times pertinent hereto the Uniform Child Custody Jurisdiction Act (hereinafter referred to as UCCJA) was in effect in California. The UCCJA and other rules of practice in California required Henry to disclose to the California Court certain factual matters which were mandatory in determining the nature and extent of the jurisdiction of the California Court and the viability of any subsequent order issued by it. Under California Civil Code Section 5158: (1) Henry was required to disclose in his first pleading whether he knew of any person not a party to the proceeding who had physical custody of the child or who claimed to have

custody rights with respect to the child; (2) he was required to also disclose information relating to any custody proceeding concerning the child pending in any court; and (3) he had a continuing duty to inform the California Court of any custody proceeding concerning the child of which he obtained any knowledge during the California proceeding.

An official form for this purpose was available to Henry and should have been used by him; it is set forth verbatim in the 1979 Supplement to Volume 12A West's Annotated California Codes, pp. 143-144. The form is purposely drafted for the required disclosure and highlights the continuing nature of the duty to disclose. Instead of using it, Henry submitted his own typewritten version. He did acknowledge Alexandra was in the physical custody of the Holdens, but did not advise the California Court of the Holdens' claim to custody, although he had such knowledge prior to the filing of his Petition on June 19, 1975, as admitted in paragraph 12 of the Statement of the Case in his Petition to this Court. (Petition, pp. 30-31.)

15. Henry had actual knowledge of the filing of the Montana proceeding at least by June 24, 1975, because of an event which occurred on that date referred to throughout the Petition.[2/] Fannie Boller was advised by Respondents on June 20, 1975 that the Montana proceeding had been filed and that temporary custody had been granted to the Holdens by the Montana District Court. On June 24, 1975, Fannie Boller, Henry and a

2/ Throughout his Petition, Henry erroneously states that this event occurred on July 24, 1975, after he had obtained his California Order, implying that Henry was, at the time, acting under the color of the California Order. This error occurs at pages 5, 38, 41, 42, 43, 46 and 54 of the Petition. The correct date, June 24, 1975, is established by the record and is set forth in the opinion of the Montana Supreme Court. (Petition, p. A8.) Henry was not acting under the color of authority of any California Order.

companion came to Montana to the Holden ranch and forcibly took Alexandra from the Holdens. Henry never personally had physical control of Alexandra during this incident. Alexandra was taken by Fannie Boller who drove off with the companion leaving Henry at the Holden home while Fannie and the companion attempted to abscond with Alexandra.

Due to the violation of Section 45-5-304 MCA, the county sheriff apprehended Fannie Boller and Henry to obtain the return of Alexandra. Because Alexandra was returned, under Section 45-5-304(3) MCA, Fannie Boller and Henry were released and no further action was taken against them.

Though Henry denied it at trial, the evidence established that Henry had actual knowledge of the Montana proceeding prior to June 24, 1975. This included the notes of Henry's California attorney, Kessler, which were made at the time relating to telephone conversations between Attorney Kessler and Henry.

At no time prior to the entry of the California Order on July 7, 1975, did Henry advise the California Court of the existence of the Montana proceeding or the claims of the Holden family.

16. By reason of the failure to provide Respondents with notice of the California proceeding allowing them an opportunity to be heard, the California Court did not have jurisdiction to enter the Order of July 7, 1975. (Cal. Civil Code Section 5153.) For the same reasons, the California Order, pursuant to California statute, had no binding effect upon the Respondents in California and was not entitled to recognition in Montana. (Cal. Civil Code Sections 5161 and 5162.)

17. There were no subsequent proceedings in California.

18. The trial of the Montana proceeding commenced

August 17, 1977. The action was not heard at an earlier date because of unjustifiable delay on Henry's part. The delay at one point resulted in economic sanctions being imposed against him.

Montana adopted by statute the UCCJA, modified in part, effective July 1, 1977. As of the effective date, Montana had continuing jurisdiction to adjudicate the matter under the UCCJA, as adopted, in addition to jurisdiction under Section 40-6-233 MCA. At the effective date of the UCCJA in Montana:

(a) Montana was Alexandra's home state by reason of her presence in Montana for more than two (2) years.

(b) Montana was the only state at that point with which Alexandra had any significant connection. Only in Montana was there substantial evidence concerning the present and future care, protection, training and personal relationships of Alexandra.

(c) California no longer had any jurisdiction over Alexandra as defined by the UCCJA.

19. The decision of the Montana District Court entered November 28, 1977, was unanimously affirmed by the Montana Supreme Court August 1, 1979; a copy of the Findings of Fact, Conclusions of Law, Judgment and Order of the Montana District Court was just submitted by Petitioner as Appendix "B" to his Petition (it was received by Respondents on December 26, 1979). Henry's Petition for Rehearing in the Supreme Court of the State of Montana was unanimously denied September 11, 1979. The Montana Supreme Court held, inter alia, that there was more than substantial, credible evidence to support the findings and judgment of the District Court. The evidence presented by Henry was not found to be credible; his motivations throughout were found to have stemmed from the urgings of his mother, Fannie Boller.

20. The Order of July 7, 1975 of the California Court was not entitled to recognition and enforcement in

Montana. The Full Faith and Credit Clause of Article IV, Section I, U. S. Constitution, does not require that Montana defer to the California Order because child custody decrees in California are modifiable and are, therefore, excepted from its provisions; more importantly, the failure to grant Respondents' basic due process as required by California statutes negates the imposition of its requirements.

21. The paramount consideration, that of Alexandra's welfare and best interests, requires at this point after four and one-half years that the Montana decree remain undisturbed. Alexandra is an integral part of the Holden family, having resided with them almost half her life. More importantly, practically all of her cognitive life has been with the Holdens.

22. For the first time ever, Henry in this Petition, raises in a tangential manner, purported federal questions arising under the Fourth and Fourteenth Amendments to the U. S. Constitution. While such action is not permitted under the Rules of this Court, it is clear that the purported federal questions are without merit.

23. The Petition should be denied.

ARGUMENT

I.

INTRODUCTION

The Petition of Henry Schwartze is replete with unwarranted invective toward the Respondents and the Montana Supreme Court. Petitioner attempts through distortions of the record to create illusions which are urged as factual. Respondents will not attempt to answer each such unfounded assertion or implication for to do so would only dignify the conduct of Petitioner and unjustifiably lengthen this brief. Respondents would only request that this Court disregard the hyperbole of Petitioner and focus upon the facts and law surrounding

the sole federal question stated above. His general thrust is, effectually, a request that this Court act as a court of general appellate jurisdiction, e.g., a second Montana Supreme Court.

The picture of Respondents which Petitioner attempts to paint is that of a very dark, sinister group. In fact, at trial, it was substantively agreed by Henry that Respondents are good, decent people motivated only by their love and affection for Alexandra Schwartze.

The factual record required for this Court to conclude that the Montana Supreme Court acted properly is uncomplicated. The Montana proceeding was commenced on June 20, 1975 pursuant to Section 40-6-233 MCA while Alexandra was physically present in Montana. Her presence conferred jurisdiction over the subject matter of the action (Alexandra) on the Montana District Court. This jurisdictional determination was affirmed implicitly in the decision of the Montana Supreme Court and is not contested by Petitioner here. As stated in Palm v. Superior Court, Cal. App. (1979), 158 Cal.Rptr. 786, at p. 797:

> "It is a fundamental tenet of jurisprudence that a court has power and obligation to determine its own jurisdiction."

The Montana statute authorizes the Respondents to test the conduct of both natural parents, thereby requiring that, at all times, a basic distinction be drawn between such an action and actions solely between natural parents. The State of Montana is called upon to act in its parens patriae capacity. In such cases, as stated in Roebuck v. Bailes, 162 Mont. 71, 508 P.2d. 1057 (1973), at pp. 76-77:

> "It is widely, if not universally, recognized that physical presence of a minor child within the borders of a state invests the courts of that state with jurisdiction to determine custody where the

> welfare of the child is concerned. (Citations omitted) . . .
>
> "The origin and fountainhead of such jurisdiction lies in the power of the state as parens patriae to protect the innocent and helpless found within its borders without regard to their legal domicile. (Citations omitted.)"

Also see In Re Appeal in Maricopa County, Juvenile Action No. JS-734 (1975) 25 Ariz. App. 333, 543 P.2d. 454, where it was stated at page 459:

> "In custody disputes, the controversy is primarily between the divorced parents with the state having a limited interest in the outcome. On the other hand, in adoption or termination proceedings, even where initiated by private parties, the state in its capacity as parens patriae has a very substantial interest . . .
>
> " . . . when the issue is primarily between the state in its parens patriae capacity and an absent non-consenting spouse, the state is justified in providing for effective termination proceedings, even in the absence of in personam jurisdiction over a non-consenting parent."

Also see Thornlow v. Thornlow, (Tex. 1979) 576S.W.2d. 697.

The Respondents obtained physical custody of Alexandra from Fannie Boller on June 17, 1975. They had at least as great a legal right to physical custody of Alexandra as did Fannie Boller. Fannie Boller, the paternal grandmother, was a volunteer acting because the legal custodian, Diane, had literally thrown Alexandra out and given her to Fannie Boller, telling Fannie to take Alexandra because she couldn't live with Diane anymore. This occurred May 12, 1975.

When Alexandra was left in Montana the Respondents knew only that, even though Diane had thrown her out

more than a month earlier, Henry, the child's father, had neither taken physical custody of her nor commenced any proceeding in California to obtain permanent legal custody. They also knew that Henry's lawyer had advised Warren Wenz, a Montana attorney and a relative, that Henry had not been able to make up his mind whether or not he wanted custody of Alexandra. The Respondents had advised both Henry and his mother Fannie, before she left Montana, that they wanted Alexandra to live with them and that they doubted the fitness of either natural parent to have custody.

In addition to custody of the subject of the proceeding (Alexandra), the Montana District Court acquired in personam jurisdiction over Henry upon his voluntary appearance by Answer in the Montana proceeding. M.R.Civ.P. Rule 4B(2).

Belatedly, acting principally in response to the urgings of his mother, after Alexandra had been left in Montana and after having been informed that Respondents were going to commence a proceeding, Henry filed a Petition in California requesting that the grant of custody provided in the initial divorce decree be changed and custody awarded to him, relying solely upon facts known to him for more than one and one-half years.

Ultimately, pursuant to a written stipulation with Diane, without notice to Respondents or any opportunity granted to them to appear in the California proceeding and without notice to the California Court of the Montana proceeding, an Order was entered granting the requested modification on July 7, 1975.

Thereafter, in the Montana proceeding, on three different occasions, Henry urged the Montana District Court that the Order dated July 7, 1975, was entitled to full faith and credit in Montana and that by reason thereof Montana was precluded from looking into any circumstances existent prior to its date. The position was rejected by three different District Judges, as well as by

the Montana Supreme Court in its unanimous decision.

The sole possible federal question presented here is whether that California Order of July 7, 1975, was entitled to full faith and credit in the Montana proceeding. A review must consider the effect, if any, of the adoption in the State of Montana of the UCCJA, effective July 1, 1977, shortly before this matter was tried in Montana in August 1977.

II.
1975

In 1975, Montana had not yet enacted the UCCJA; therefore, there were no statutory guidelines establishing a basis for recognition of custody decrees of other states. While most states which had considered the matter had determined that custody decrees were not entitled to full faith and credit for a variety of reasons, Montana held in Roebuck v. Bailes, supra, that the custody decrees of other states were res judicata in Montana and entitled to full faith and credit on the issue of custody as of the time of the adjudication and any modification thereof in Montana would have to result from changed circumstances since the date of the original decree. In Svennugsen v. Svennugsen, 165 Mont. 161, 527 P.2d. 640 (1974), the Montana Supreme Court qualified this rule by holding that before custody decrees would be found generally to be res judicata, the parties involved must have had an opportunity to contest the issues in the prior proceeding and that proof of unfitness could be substituted for a showing of change in circumstances where the custody issue had not been contested in the prior proceeding.

These Montana decisions are in accord with the decisions of this Court. People v. Halvey, (1947) 330 U.S. 610, 67 S.Ct. 903, 91 L.Ed. 1133, held that, even if the Full Faith and Credit clause applied in custody

situations, the clause would not require a state to honor the terms of a prior custody order of a sister state where, under the circumstances, the prior order could be modified by the rendering state. California Civil Code Section 4600 authorizes modification of custody decrees in that state.

Ford v. Ford, (1962) 371 U.S. 187, 83 S.Ct. 273, 9 L.Ed. 2d 240, held, inter alia, that the Full Faith and Credit clause, if applicable to custody decrees, would only require Montana to recognize a California decree in the instant action if the California Court were bound by it. In Ford, the custody decree in question had been issued in Virginia pursuant to a private agreement between the parties without any hearing on the merits. The Virginia Court neither examined the terms of the agreement nor exercised its own judgment as to what was best for the children involved. Under the circumstances, this Court determined in Ford that South Carolina was not bound by the terms of the Virginia decree. It has been suggested that implicit in Ford is the determination that full faith and credit need not be granted to custody decrees which fail to meet procedural or substantive standards. Ford v. Ford, 73 Yale Law Journal 134, 138 (1963).

Here the California Order of July 7, 1975 recites that it was entered solely upon a reading of the declarations of Henry Schwartze which were submitted in support of the requested modification. (Also before the California Court was the stipulation of Diane consenting to the modification.) This recitation is significant for the declarations formed the basis for a determination that California was in compliance with the provisions of its version of the UCCJA and, therefore, had jurisdiction to enter its Order.

Cal. Civil Code Section 5158 mandatorily required that Henry:

> (1) Disclose any knowledge he had of any person not a party to the California proceeding who

> either had physical custody of the child involved or claimed custodial rights;
> (2) Disclose information relating to any custody proceeding concerning the child pending in any court; and
> (3) Continually inform the court during the California proceeding of any custody proceeding concerning the child of which he obtained any knowledge.

As the Commissioners' Note to this section of the UCCJA indicates:

> "It is important for the court to receive the information listed and other pertinent facts as early as possible for purposes of determining its jurisdiction, the joinder of additional parties, and the identification of courts in other states which are to be contacted under various divisions of the Act." 9 Uniform Laws Annotated 146, Section 9 UCCJA.

As outlined in Respondents' Statement of the Case, Henry never fulfilled his statutory duty to the California Court for he never advised it of the claims of the Holdens to custody or of the pendency of the Montana proceeding.

The purpose of the disclosures is to insure compliance with Cal. Civil Code Section 5153 which commands that before making a decree reasonable notice and opportunity to be heard must be given to (among others) contestants and any person who has physical custody of the minor child involved. "Contestant" and "physical custody" are defined in Cal. Civil Code Section 5151 as follows:

> "(1) 'Contestant' means any person . . . who claims a right to custody . . . with respect to a child'

(8) 'Physical custody' means actual possession and control of a child."

The Holdens qualify on both counts. These uncomplicated definitions are within the spirit of the UCCJA which is intentionally designed to bring all interested parties before a court as soon as conveniently possible. Any limitation would violate that intent.

Henry strenuously argues that the nature of the physical custody of the Holden family at the time of the commencement of the California proceeding did not require any such notice or opportunity to be heard. This disregards the precise language of the UCCJA. At page 45 of his Petition, Henry quotes Professor Brigitte Boddenheimer to the effect that a child's temporary presence in a state under the UCCJA does not confer custody jurisdiction on the visited state. A reading of the context in which the statement was made by Professor Boddenheimer conclusively shows that she was speaking of the jurisdiction of a particular state to hear a custody proceeding. The statement has absolutely nothing to do with the right of a person who either has physical custody or claims custodial rights to notice of a proceeding and an opportunity to appear therein, whether that person resides in or out of the state where the proceeding is pending. Henry erroneously merges two distinct and important principles: (1) jurisdiction, and (2) due process. There is no such term in the UCCJA as "physical custody jurisdiction" as used on page 45 of the Petition.

The Commissioners' Note with reference to California Civil Code Section 5153 declares that:

> "Strict compliance . . . is essential for the validity of a custody decree within the state and its recognition and enforcement in other states ." 9 Uniform Laws Annotated 130.

If the California Court had been properly advised,

Cal. Civil Code Section 5159 required the joinder of the Holdens and notice to them per Cal. Civil Code Section 5154. Under Cal. Civil Code Section 5160, the appearance of the Holdens could have been ordered and jurisdiction over them obtained. Also, prior to proceeding the California Court was under a duty under Cal. Civil Code Section 5155(2) and (3) to consult with the Montana Court. (Actually the California Court should have done this on its own motion as it was at least advised that Alexandra was in the physical custody of the Holdens.) The recent California case of In Re the Marriage of Schwander, Cal. App. (1978) 79 Cal.App. 3d. 1013, 145 Cal.Rptr. 325, supports this view, requiring the joinder of the Holdens. As indicated in the Commissioners' Prefatory Note to the UCCJA, the Act stresses the importance of personal appearance, before the court, of nonresidents claiming custody, and of the child. 9 Uniform Laws Annotated 111, 114.

Cal. Civil Code Section 5161 provides that a custody decree binds all parties who have been served or notified in accordance with Section 5154 and who have had an opportunity to be heard. As to these parties, the decree is conclusive. It elementally follows that the 1975 California Order was not binding upon the Respondents because they did not receive any notice or have any opportunity to be heard. Since the Respondents were not bound by the 1975 California Order, it is not entitled to full faith and credit in Montana under either the prior decisions of this Court or the Montana Supreme Court.

See In Re the Marriage of Verbin, (Wash. 1979) 595 P.2d. 905, which held that a Maryland decree was not entitled to full faith and credit in the State of Washington, where the Maryland court had not been advised of the pendency of the Washington proceeding, and that a court may refuse to give full faith and credit if a decree was so obtained.

The great weight of authority is that where a rendering state had no jurisdiction over a party or parties involved, its decree is not entitled to full faith and credit in sister states. People v. Halvey, supra, at page 906.

Henry acknowledges, in his Petition, that Respondents are not bound in California by the 1975 Order, suggesting that the Respondents have the right to litigate the issue there. It is a non sequitur then to urge that Respondents are bound by the Order in Montana under the most basic interpretation of the Full Faith and Credit clause which requires that before the Order can "bind" in Montana, it must "bind" in California. The inconsistency is fatal to Henry's basic contention.

It is clear, therefore, that when the California Order was presented in late 1975, the Montana District Court under the circumstances was entitled to determine, as it did, that the Order was not entitled to full faith and credit in Montana, and that the action in Montana could proceed. The remaining question relates to the effect, if any, of the adoption by Montana of its version of the UCCJA July 1, 1977, prior to trial on the merits.

III.
1977

The UCCJA does not determine the applicability of the Full Faith and Credit clause to custody decrees. The Act recognizes the sound policy reasons supporting a determination that the clause does not apply to such decrees and it is a legislative response which seeks to resolve the matter as far as possible among states which enact it. There can be no uniform application because each state retains the right to vary the Act by the legislative process and to judicially interpret its intent based upon the needs of each state.

The first question which arises is its application to pending cases. Contrary to the suggestion of Petitioner, the Montana Supreme Court here held the Act to be

applicable to pending cases, but, citing Pitrowski v. Pitrowski (N.Y. 1979) 412 NYS2d. 316, held that the enactment would not disturb jurisdictional rulings made prior to its effective date. (Petition, A. p. 15-16.) Certainly the Act can have no application prior to its effective date. 3/

A review must be made of the facts on July 1, 1977, the effective date. By then Alexandra had been in Montana over two (2) years. She had not even seen her father during that time. She had become integrated into the Holden family. She had attended school and engaged in all other normal activities during that time in Montana. Meanwhile, Henry now also had an admitted drinking problem, in addition to financial difficulties.

Montana had become Alexandra's "home state," defined in Section 40-7-103(5) MCA as the state where she lived for at least six (6) months with a "person acting as a parent" (defined in Section 40-7-103(9) as a person other than a parent who has physical custody and claims a right to custody). The Holdens are surely "persons acting as parents."

Montana became the only state where Alexandra and one of the contestants had any significant connection as defined in Section 40-4-211(b) MCA. See Ratner, Child Custody in a Federal System, 62 Mich. L.Rev.795,818 (1964) who explains:

> "Most American children are integrated into an American community after living there six months; consequently this period of residence would seem to provide a reasonable criterion for identifying the established home."

3/ The discussion by the Montana Supreme Court as to the entitlement of its decision here to binding recognition in other states which have enacted the UCCJA is not a matter before this Court in any form. Petitioner's argument relating to that discussion should be disregarded. The discussion is purely dicta and is not determinative of the issues here.

California no longer had any jurisdiction as defined in the Montana Act because:

(1) It was no longer Alexandra's home state under 40-4-211(a) MCA. It did remain her home state for one year after she left California under Cal. Civil Code Section 5152 (1)(a)(ii), where an extension of six months is granted, because Alexandra was absent from California because she was retained in Montana by the Holdens (persons acting as parents) who claimed custody. Henry had until June 1976 to commence a proper proceeding in California, long after the first determination by a Montana District Court on September 8, 1975, that the July 7, 1975 Order was not entitled to full faith and credit in Montana because the Respondents had not been joined in that proceeding. Henry could have refiled and obtained jurisdiction in California over Respondents in a proper proceeding. He never did. See Boddenheimer, Uniform Child Custody Jurisdiction Act (1969) 22 Vand. L.Rev. 1207, 1225.

(2) Alexandra no longer had any significant connection with California as defined in Section 40-4-211(b) MCA. See Marriage of Settle, (Or. 1976) 556 P.2d. 962 where it was held that after children ages four and eight had been gone for 20 months from Indiana they no longer had any significant connection there as required by this section. (Here Alexandra, age eight, had been gone from California 24 months.)

(3) Alexandra was not physically present which might grant jurisdiction to California under Section 40-4-211(c) MCA. Further, Montana was exercising jurisdiction precluding the operation of Section 40-4-211(d).

Therefore, Montana need not defer to California under the requirements of Section 40-7-115(1) MCA because California (in 1977) did not have the necessary jurisdictional prerequisites substantially in accordance with the Montana Act. This analysis shows conclusively that Montana did not "bootstrap" itself into jurisdiction under the Montana UCCJA. Montana always had jurisdiction and continued to have it under the UCCJA. California also had jurisdiction initially but lost it when Henry did not proceed properly in his initial proceeding and took no corrective action to cure his defective procedure. Instead he chose to voluntarily appear in Montana by commencing discovery in late 1975 and by filing his Answer to the Complaint on May 27, 1976, where the issues involved were vigorously tried, and after presentation of all the evidence, the Montana Supreme Court found more than substantial credible evidence to support the judgment of the District Court.

Henry misrepresents the decision in California in Palm, supra, at page 39 of his Petition where he quotes from a dissenting opinion. In fact, in Palm, California recognized that North Dakota had concurrent jurisdiction with it (which can occur under the UCCJA) and that even though California was the "home state" of the child involved and North Dakota was only a state visited infrequently, California would defer to North Dakota since it had assumed jurisdiction by concluding it was a state with which the child had significant contact. North Dakota is also a UCCJA state. At pages 49-51 of the Petition, Henry again quotes from Palm, suggesting that Montana could not act because California retained jurisdiction. The fallacy of this argument has been outlined above; further, the decision by the Montana Supreme Court, implicit in its opinion, that California retained no continuing jurisdiction, is solely one for state determination.

Respondents respectfully contend that as of July 1, 1977, the only state with jurisdiction was Montana. By his own conduct, Henry caused the State of California to lose any continuing jurisdiction it might have had after Alexandra left there in 1975 (although such continuing jurisdiction would not have precluded action by Montana under the UCCJA).

IV.
Conclusion

The scope of the UCCJA is limited to states which enact it— 27 as of this date. The Act is not intended to derive any sustenance from the Full Faith and Credit clause of the U. S. Constitution. Its intent is to provide a statutory scheme of interstate recognition of custody decrees. Strict compliance with the due process mandates of notice and opportunity to appear is the bedrock of the Act. Absent such strict compliance, there is no statutory entitlement to recognition, just as there would be no entitlement generally to recognition under the Full Faith and Credit clause.

The decision of the Montana Supreme Court is in compliance with the prior decisions of this Court in Halvey, supra, Ford, supra, and Armstrong v. Manzo, (1965) 380 U.S. 545, 85 S.Ct.Rptr.1187, 14L.Ed.2d.62.

The 1975 California Order received the same effect in Montana as it was entitled to receive in California (there was no showing it did not). Because the California Order was subject to modification there, under Halvey, supra, it was not entitled to full faith and credit in Montana. Also, because the Respondents were not granted the basic due process rights mandated by statute, the California Order was not entitled to full faith and credit in Montana under Ford, supra, or Armstrong v. Manzo, supra.

The California Order was nothing but a sham. It was

obtained by deceit practiced on the California Court. Its sole purpose was to preclude a hearing on the merits because Henry knew what the result of such a hearing would be— that which occured at the trial in Montana. The Full Faith and Credit Clause can not be used to ratify such conduct.

The UCCJA does not and cannot alter the application of the Full Faith and Credit clause for the sound reasons expressed by this Court in its prior decisions.

After more than four and one-half years the compelling best interests of a little girl, Alexandra Schwartze, require that this matter be concluded and that she be allowed to remain where she is loved and accepted as an equal member of a happy family. Even Henry acknowledged at trial that Alexandra is an integral part of the Holden family. The rights and desires of any other person or state must be subordinated to that compelling necessity after this length of time. Her childhood is fast passing, as she approaches adolescence. It would be cruel and inhuman for any other result to occur. Alexandra has forgotten the heartache and outright terror which filled her years in California. She acknowledges only one family— the Holdens.

Respondents pray that certiorari be denied.

DATED this 28th day of December, 1979, at Great Falls, Montana.

Respectfully submitted,

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APPENDIX

IN THE SUPREME COURT
OF THE STATE OF MONTANA

No. 14228

EMIL WENZ, et al.,

Plaintiffs and Respondents,

v.

DIANE SCHWARTZE, et al.,

Defendants and Appellants.

ORDER

PER CURIAM:

This Court having considered the petition for rehearing filed by appellants herein,

IT IS ORDERED the petition for rehearing is denied.

DATED this 11th day of September, 1979.

§ Frank I. Haswell
Chief Justice

§ Gene B. Daly

§ John Conway Harrison

§ Daniel J. Shea

§ John C. Sheehy
Justices